Editor's note: Reconsideration denied by Order dated March 10, 1993

POWDER RIVER BASIN RESOURCE COUNCIL
WYOMING CHAPTER OF THE SIERRA CLUB
WYOMING OUTDOOR COUNCIL

IBLA 92-12 Decided September 15, 1992

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, offering Federal coal lease application for competitive sale. WYW-117924.

Motion to expedite granted; motions to dismiss granted in part and denied in part; decision affirmed.

1. Administrative Procedure: Standing--Appeals: Generally--Rules of Practice: Appeals: Standing to Appeal

   Where an appellant makes no colorable allegation of adverse effect, but solely alleges injury to environmental informational interests (deprivation of information guaranteed by a Federal statute), it has not established that it was adversely affected within the meaning of 43 CFR 4.410(a), and its appeal is properly dismissed for lack of standing. A mere general inter-est in a problem, absent colorable allegations of adverse effect, is insufficient to confer standing.

2. Appeals: Jurisdiction--Board of Land Appeals: Generally--Rules of Practice: Appeals: Jurisdiction--Secretary of the Interior

   A decision that is approved by the Secretary of the Interior is not subject to review by the Board of Land Appeals. 43 CFR 4.410(a)(3).

3. Coal Leases and Permits: Generally--Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

   BLM was authorized to hold a coal lease sale in response to an application for coal deposits where the lands applied for were outside coal production regions following decertification of the Powder River Coal Region. A decision by BLM taking action under that authority is properly affirmed in the absence of a convincing showing that BLM abused its discretion.

4. Coal Leases and Permits: Generally--Environmental Policy Act: Generally--Environmental Quality: Environmental Statements

> An EIS need not be prepared if, on the basis of an adequate EA, BLM finds that the proposed action will produce "no significant impact." A finding of no significant impact (FONSI) will be affirmed on appeal if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. Appellants bear the burden of proving error; expressing disagreement with BLM's actions is not enough to succeed on appeal. Where the party challenging the FONSI fails to show that it was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action; and where BLM's EA is an exten-sive analysis of environmental concerns, the issuance of the FONSI will be affirmed.

APPEARANCES: Mark Squillace, Esq., Laramie, Wyoming, and Dan Heilig, Esq., Lander, Wyoming, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Jerome C. Muys, Esq., Washington, D.C., Jack L. Brandon, Esq., Oklahoma City, Oklahoma, for intervenor Kerr-McGee Coal Corp.; Vicci M. Colgan, Esq., Cheyenne, Wyoming, for intervenor State of Wyoming; Charles L. Kaiser, Esq., and Scott W. Hardt, Esq., Denver, Colorado, for amicus curiae, Thunder Basin Coal Co.; Michael H. Hyer, Esq., Flagstaff, Arizona, for intervenor Powder River Coal Co., Edward F. Bartlett, Esq., Butte, Montana, and Davis O'Connor, Esq., Denver, Colorado, for amicus curiae, Northwestern Resources Co.; Charles W. Anderson, Esq., Gillette, Wyoming, for amicus curiae, City of Gillette, Wyoming; Russell A. Hansen, Esq., Gillette, Wyoming, for amicus curiae, Campbell County, Wyoming.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Powder River Basin Resource Council (PRBRC), Wyoming Chapter of the Sierra Club (Sierra Club), and Wyoming Outdoor Council (WOC) (appellants) have filed a joint appeal from the August 16, 1991, decision of the Wyoming State Office, Bureau of Land Management (BLM), offering the Federal coal lease application of Kerr McGee Coal Corp. (KMCC) for competitive sale.

On October 10, 1989, KMCC filed its application with BLM for a coal lease for lands adjacent to its existing Jacobs Ranch Mine. 1/ KMCC sought

1/ The application was twice modified subsequently, on Jan. 19, 1990, and July 18, 1990, to include slightly different lands. KMCC's application was one of six made in the region by coal concerns seeking expansion of existing coal mines. Only KMCC's application is directly at issue in this appeal.

approximately 132 million tons of Federal coal on approximately 1,709 acres. At that time, the lands applied for were within the Powder River Coal Region and were accordingly not subject to leasing by application unless "an emergency need for unleased coal deposits" could be demonstrated. 43 CFR 3425.0-2. KMCC's application asserted that, if not leased, the coal in the lands applied for would be bypassed, a condition that could justify an emergency lease sale. See 43 CFR 3425.1-4(a)(1)(ii).

However, the Powder River Regional Coal Team (PRRCT), after public notice and comment, decertified the Powder River Coal Region. 2/ Under 43 CFR 3425.0-2, the Department may consider holding lease sales apart from the lease process set out in the regulations in areas outside coal production regions. 3/ Appellants acknowledge that, by decertifying the lands, BLM removed them from the coal region, so that it was authorized to issue a lease without engaging in that process. Following decertification, BLM noted that the tract applied for was classified as a "maintenance tract" (Memorandum from BLM Wyoming Coal Project Manager to Casper District Manager, BLM, May 22, 1991). The authority to issue leases for maintenance tracts was expressly recognized by PRRCT when it decertified the region. 4/

On March 28, 1991, KMCC filed a proposed Environmental Assessment (EA) with the Casper District Office, BLM. On April 10, 1991, BLM published notice of public hearing to receive comments on the EA, as well as on the

---

2/ The background, authority, and procedures of the PRRCT are set out in the Answer of the State of Wyoming at 3-6. Its voting members are the Governors of Montana and Wyoming, the Wyoming and Montana State Directors, BLM, and the Deputy State Director for Mineral Resources, Wyoming State Office, BLM.

Appellants describe the decertification as follows:

"On February 9, 1989, * * * BLM published a notice in the Federal Register seeking public comment on a proposal to 'decertify' the Powder River Basin as a coal production region. Despite protest from industry and public interest groups, the [PRRCT] recommended that the Powder River Coal Production Region be decertified subject to four conditions: (1) the [PRRCT] would remain active and guide subsequent coal leasing by application that occurs within the region; (2) the BLM leasing by application process would be restricted to applications for maintenance tracts only; (3) the [PRRCT] would consider on a case-by-case basis an applica-tion for a 'new start' mine; and (4) operating guidelines for processing coal leasing by application would be acceptable to the [PRRCT]. In a decision published [in the Federal Register] on January 9, 1990, [55 FR 784-85,] the Secretary of the Interior accepted the [PRRCT's] recommendation to decertify the Power River Coal Production Region. 55 Fed. Reg. 784 (1990)." [Footnotes omitted.] (Statement of Reasons at 5-6).

3/ That process requires, inter alia, substantial land use planning, delineation and ranking of tracts, and solicitation of expressions of leasing interest. See 43 CFR 3420.3 through 3420.5-2.

4/ See note 2, supra.

proposed sale generally, including the fair market value and maximum economic recovery of the coal. 56 FR 14530 (Apr. 10, 1991). Additionally, on April 30, 1991, BLM sent notice to interested parties providing a "scoping period" to identify issues and concerns about KMCC's application. 5/

BLM also convened scoping meetings for various groups. The record contains a schedule showing that separate meetings were set for the State of Wyoming, Federal agencies, locally elected officials, conservation groups, commodity groups, and United States Senators and Members of the House of Representatives. The record shows that a public scoping meeting was held on May 14, 1991, in Gillette, Wyoming, and was attended by representatives of appellant PRBRC, and that BLM answered its questions concerning, among other things, the adequacy of the EA, whether BLM should prepare a full environmental impact statement (EIS), water quality, reclamation, and the method of determining the fair market value of the coal.

On June 4, 1991, BLM released the draft EA, which analyzed three alternatives: no action, a new stand-alone mine, and leasing the tract as an extension of the existing Jacobs Ranch Mine, that is, granting KMCC's application. BLM determined in the EA that environmental impacts of the last, preferred alternative could be mitigated. The analysis showed no expected significant environmental or social impacts from leasing the tract. The record shows that the draft EA was widely disseminated by BLM, with over 150 copies mailed to interested parties. The EA was offered for public comment from June 10 through July 12, 1991.

In addition, a public hearing was held on the application at 7 p.m. on June 24, 1991, in Gillette, Wyoming. The only speaker was a representative of KMCC. However, the record indicates that, after the formal presentation, questions were raised by attendees about environmental matters.

On July 8, 1991, the Casper District Office, BLM, recommended that the acreage applied for be increased by 80 acres, described as lots 2 and 6-9, sec. 35, T. 44 N., R. 70 W., sixth principal meridian. BLM explained that, when the resource management plan was completed it was believed that there was no coal on that parcel because the "burn line" (marking the border between minable coal and burned coal) apparently extended through it. However, based on new data presented in a mineral report, it was determined that coal was present and should be considered for leasing.

Comments on the draft EA were filed, including those by appellants. WOC called for BLM to prepare a region-wide EIS for the entire Powder River Basin coal area. Such EIS, it submitted, would consider the cumulative impacts of all lease expansions, combined together, that might present serious impacts not adequately perceived or addressed via the process of doing EA's for individual leases. PRBRC raised questions concerning availability to KMCC of coal reserves other than those applied for, and

5/ That notice also concerned another application (WYW-118907) not at issue here.

groundwater impacts on wells within 6 miles of the proposed mining activity. PRBRC also questioned whether BLM should "incorporate measures to enhance competition in the [lease-by-application] process, such as interactive bidding" and stressed the "lack of a current cumulative environmental analysis addressing mining activities to date and projected impacts from mining additional tracts." The Sierra Club also called for BLM to prepare a comprehensive EIS that addresses all lease applications within the region, examining cumulative impacts on wildlife and ground and surface water, as well as air pollution, reclamation, fugitive coal dust, socio-economic effects, and cultural resources.

On August 16, 1991, BLM issued the decision under appeal, offering coal lease application WYW-117924 for competitive sale. Also on that date, BLM released its final EA, which specifically addressed appellants' comments.

The record indicates that a copies of BLM's decision and the final EA were mailed to each appellant by certified mail. Return receipts in the record show that appellant PRBRC received its copy on August 22, 1991, and that appellants WOC and the Sierra Club received theirs on August 23, 1991. A single notice of appeal was filed by counsel for all three appellants with BLM on September 25, 1991. 6/

On September 26, 1991, BLM held the Jacobs Ranch lease sale. KMCC was the only bidder.

BLM, the State, KMCC, and others (movants) have filed a motion to dismiss appellants' appeal for lack of standing, as well as motions to lift the stay imposed by 43 CFR 4.21(a) or, alternatively, to expedite consideration on the merits. For good cause shown, we grant the motion to expedite. For the reasons set forth below, we grant in part and deny in part the motion to dismiss for lack of standing.

6/ BLM correctly points out in the memorandum transmitting the appeal to this Board that appellants' joint notice of appeal was not filed within the 30-day time period provided by 43 CFR 4.411(a). The deadline to file a notice of appeal was extended for all appellants until the close of business on Monday, Sept. 23, 1991. See 43 CFR 4.22(e). Although the joint notice of appeal was not filed until Sept. 25, 1991, it was nevertheless timely. Under 43 CFR 4.401(a), whenever a document (including a notice of appeal) is required to be filed within a certain time and is not received in the proper office during that time, the delay in filing will be waived if (1) the document is filed not later than 10 days after it was required to be filed, and (2) it is determined that the document was transmitted or probably transmitted to the office in which filing is required "before the end of the period in which it was required to be filed," that is, in this case, on or before Sept. 23, 1991. The notice of appeal bears that date, as does the envelope in which it was transmitted to BLM. Thus, both criteria of 43 CFR 4.401(a) have been met, the delay in filing is waived, and the notice of appeal is properly considered timely filed.

[1] Movants contend that appellants are not "adversely affected" by BLM's decision within the meaning of 43 CFR 4.410(a). In their statement of reasons, appellants asserted standing based on allegations that their members have enjoyed "recreational and aesthetic" experiences on the lands covered by the proposed lease sale and that some members own wells that could be adversely affected by mining operations there. Movants request dismissal of the appeal for failure to allege facts sufficient to show standing, arguing that the Board should not speculate as to what the alleged harm might be, citing Mark S. Altman, 93 IBLA 265 (1986); Gladys Boquist, 90 IBLA 168 (1986) (vacated in effect on reconsideration upon showing of adverse effect by appellant (Gladys Boquist (On Reconsideration), 90 IBLA 168A (1987)); and Save Our Ecosystem, Inc., 85 IBLA 300 (1985) (Motion to Dismiss at 5). They argue that, by requiring that a party must be "adversely affected," the Department requires a showing of specific, identifiable harm to the individual seeking standing over and above the possible harm to members of the public generally. Relying on language from Sierra Club v. Morton, 405 U.S 727, 739 (1972), they argue that a mere general interest in a problem is insufficient to provide standing to appeal. 7/

Appellants have responded, citing High Desert Multiple Use Coalition, Inc., 116 IBLA 47, 48 n.1 (1990), in which we rejected the notion that judicial determinations of standing control questions of administrative standing. Appellants urge that we determine whether allowing standing will assist the agency in the fulfillment of its functions and have filed affidavits attempting to demonstrate that their members do use and enjoy the natural, aesthetic, and recreational resources of the area and may be adversely affected by BLM's decision. Appellants assert that the injury claimed is personal to members of PRBRC who own wells within the cumulative impact area, as those wells may be adversely affected by the proposed mining activities, and to members of each of appellants' organizations who live and recreate in areas that may suffer reduced visibility because of mining activity (Affidavit Attachments D-F; Appellants' Response to Motion to Dismiss at 8).

Appellants contend additionally that their informational interests have been adversely affected by BLM's decision, arguing that many courts

---

7/ Movants also cite Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), and Lujan v. National Wildlife Federation, 497 U.S. ___, 110 S.Ct 3177 (1990). In the former, the Supreme Court rejected a taxpayers' lawsuit challenging an agency decision for failure to show specific harm to the individual over and above that shared by other taxpayers. The Court in that case related that it avoided adjudicating "abstract questions of wide public signifi-cance which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." 454 U.S. at 475. Movants state that the Supreme Court held in the latter case that "generalized affidavits, which in and of themselves showed no specific harm, were inadequate to show that the party was adversely affected" (Motion to Dismiss at 10).

have "accepted the claim that the deprivation of information guaranteed by a federal statute such as NEPA is sufficient to support standing, so long as the interests sought to be protected are arguably within the zone of interests sought to be protected by the statute." Id. at 8-9. In response, movants argue that to accept informational standing would be to grant any environmental organization standing in any case on which the government prepares an EA or EIS: "In sum and substance, the theory of informational standing is nothing more than the private attorney general theory rejected by the Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972)" (Movants' Reply to Appellants' Response to Motion to Dismiss at 6). Finally, movants note that the D.C. Circuit, which first espoused this theory, has since disavowed it, citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84-85 (D.C. Cir. 1991) (Id.; KMCC Reply to Appellants' Response to Motion to Dismiss at 9-11).

This Board has previously recognized that the interest adversely affected by the appealed decision under 43 CFR 4.410(a) must be legally cognizable (Glenn Grenke v. BLM, 122 IBLA 123, 128 (1992); Colorado Open Space Council, 109 IBLA 274, 280 (1989)) and has found economic and non-economic (including cultural, recreational, and aesthetic interests in the use and enjoyment of the public lands) to be among those legally cognizable interests. See, e.g., Animal Protection Institute of America, 117 IBLA 208, 209-10 (1990); High Desert Multiple-Use Coalition, supra at 48; California Association of Four Wheel Drive Clubs, 30 IBLA 383, 386 (1977). Standing also rests in part on whether allowing standing will assist the agency in fulfillment of its functions. Animal Protection Institute of America, supra at 210; High Desert Multiple-Use Coalition, Inc., supra at 48-49, n.1. If injury or adverse effect can be shown, it is irrelevant whether others could demonstrate the same injury or adverse effect or whether the injury or adverse effect is shared by the public at large. Nonetheless, the allegation of adverse effect must be colorable, identify-ing specific facts giving rise to a conclusion, rather than merely stating a conclusion. California State Lands Commission, 58 IBLA 213, 217 (1981).

The sole affidavit submitted by WOC was that of Stephanie Kessler, which makes no colorable allegation of adverse effect, but solely alleges injury to environmental informational interests (Affidavit of Kessler at 2). Allegations of injury to informational interests do not establish that appellants were adversely affected within the meaning of 43 CFR 4.410(a). Standing on this basis cannot be squared with the rule, adopted by this Board, that a mere general interest in a problem, absent colorable allegations of adverse effect, is insufficient to confer standing. Donald Pay, 85 IBLA 283, 285-86 (1985), and cases cited. Accordingly, WOC's appeal must be dismissed for lack of standing.

The motions to dismiss the appeals of the Sierra Club and PRBRC are denied. Both appellants have asserted colorable allegations of adverse effect by the decision being appealed. Having disposed of the foregoing preliminary matters, we turn to the merits of the subject appeal.

[2] We note initially that, although appellants emphasize their concern with the decision to decertify the Powder River Coal Region, that decision was approved by the Secretary of the Interior and is therefore not subject to review in this appeal. 43 CFR 4.410(a)(3).

Further, appellants state concerns with the manner in which the Department is now managing coal sales in the Powder River Basin (Statement of Reasons at 8). Those issues are also not before us, as the Board's authority is limited to considering appeals from decisions by BLM. See 43 CFR 4.410(a).

[3] BLM was authorized in the circumstances presented in this case to hold a coal lease sale in response to KMCC's application for coal deposits, as those lands were outside coal production regions following decertification of the Powder River Coal Region. See 30 U.S.C. § 201(a)(1) (1988); 43 CFR 3425.1-5. A decision by BLM taking action under that authority is properly affirmed in the absence of a convincing showing that BLM abused its discretion.

Appellants make much of BLM's failure "to review and analyze any tract configuration other than that proposed by the applicant" and assert that the alleged failure may have compromised BLM's ability to maximize the government's return (Statement of Reasons at 9). We note initially that we are not convinced by appellants' speculation that BLM's actions resulted in any loss of income to the Federal government. The lease as offered will generate income, and the factors involved are generally independent of the manner in which the coal is initially leased.

In any event, as noted above, BLM is authorized to hold a lease sale for coal deposits identified by an applicant. It is clear that the PRRCT and the Secretary of the Interior, in decertifying the Powder River Coal Region, were fully aware of the possibility that individual entities would apply for coal leases in configurations benefitting them. The decision to decertify was expressly a manifestation of a policy to allow lease by application. Although appellants attempt to show that that policy violates the Federal Coal Leasing Amendments Act, that question is not properly before this Board. It is enough to affirm BLM's actions here that the regulations authorize BLM to hold a coal lease sale for lands as configured by the applicant and that the regulations governing such sales were followed. Appellants have demonstrated no improprieties in the manner in which the lease sale was conducted. Nothing indicates that other entities were barred from bidding on coal offered, that fair market value was not received, or that maximum economic recovery will not be achieved. See generally 43 CFR Subpart 3422.

Appellants argue that, under the Powder River Operational Guidelines for Coal Leasing, applications may be filed only for "maintenance tracts," which are defined as "unleased blocks of Federal coal * * * to expand the life of the mine * * * but not expand any permitted annual production capacity of that mine." That guideline appears to prevent an applicant from unduly tying up coal reserves for speculative purposes through the

leasing-by-application procedures. 8/ The question of whether the sale complied with that guideline is a highly technical one. BLM was evidently satisfied that the guideline was met, and appellants have made no convinc-ing showing that this was not so.

Appellants also stress that BLM has the authority to "add or delete lands from any area covered by an application for any reason [its autho-rized officer] determines to be in the public interest." 43 CFR 3425.1-9. Although BLM has the authority to depart from the wishes of the lease applicant, it elected not to exercise that authority here in a manner acceptable to appellants. 9/ We see nothing showing that its decision was an abuse of its discretion in this case. To the contrary, the record shows that there was a rational basis for BLM's decision to offer the tract as generally configured by KMCC and as modified by BLM to ensure maximum economic recovery of the coal (see BLM Answer at 38-40).

Finally, appellants assert that BLM erred by not gaining approval of the PRRCT for the lease sale. Under Departmental regulations, the regional coal team must guide tract delineation only when the lands applied for are within its region. See 43 CFR 3425.0-2 and 3425.1-5. Such was not the case here. In any event, PRRCT's decision approving decertification did permit BLM to process applications for maintenance tract leases without PRRCT review and consideration. 55 FR 785 (Jan. 9, 1990). Appellants have failed to show that KMCC's application was not for a maintenance tract. Finally, as the State points out, the PRRCT met prior to the lease sale here and considered whether to recertify the area applied for. There is no doubt that PRRCT was aware of the lease sale and effectively approved it.

[4] Appellants generally challenge BLM's decision to prepare an EA for this lease sale rather than a full EIS. It is well established that an EIS need not be prepared if, on the basis of an adequate EA, BLM finds that the proposed action will produce "no significant impact," that is, makes a finding of no significant impact (FONSI). See 40 CFR 1501.4; Union Oil Co. of California, 102 IBLA 187 (1988). A FONSI will be affirmed on appeal to this Board if the record shows that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. Oregon Natural Resources Council, 115 IBLA 179, 182 (1990); Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). Appellants bear the burden of proving error; expressing disagreement with BLM's actions is not enough to succeed on appeal. Southwest Resource Council, Inc., 73 IBLA 39 (1983). The party challenging the FONSI must show that it was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action. The Sierra Club, Inc., 107 IBLA 96, 105 (1989); Oregon Natural Resources Council, supra.

8/ See Report to the Congress: Analyses of the Powder River Basin Coal Lease Sale: Economic Evaluation Improvements and Legislative Changes Needed, Government Accounting Office, May 11, 1983; Answer of the State of Wyoming at 34-35).

9/ BLM did in fact reconfigure the tract slightly in early 1990 to avoid bypassing coal.

We note that BLM's EA is itself an extensive analysis of environmental concerns. It contains a careful review of the environmental problems presented by the action and identifies relevant environmental concerns. Its conclusion that there is no significant impact is reasonable and consistent with previous BLM decisions regarding similar lands in the Powder River Basin.

It is not seriously disputed that the lands applied for by KMCC are substantially similar to those previously leased. There is substantial ongoing coal mining there, the environmental impacts of which, including cumulative impacts, have been extensively reviewed in previous EIS'. 10/ An EA which refers to previous applicable EIS' is legally sufficient. This concept, known as "tiering," is appropriate so that the cumulative effects of an entire program need not be reiterated unnecessarily. Oregon Natural Resources Council, supra; see 40 CFR 1500.1(b) and (c), 1501.7(a)(3). The question is whether appellants have identified any significant environmental impacts that were not identified and considered in previous EIS'. Nothing in the case record or on appeal shows that there are any significant environmental impacts from the proposed action that have not been fully considered previously.

Challenging the sufficiency of the EA, appellant first points to the fact that the EA documents a total of 56 wells permitted in the shallow coal aquifers within 6 miles of the proposed lease area (EA at 23), but fails to state the aquifer from which the wells draw or how the wells might be impacted. BLM responds that the EA does identify the impacts on shallow-water wells, explaining in everyday English what could happen to wells drilled into shallow aquifers. BLM states that it chose not to go into further detail because that environmental effect is beyond the scope of the EA and more appropriate for consideration in connection with an application for approval of a mine plan.

BLM notes that the EA incorporates by reference the relevant published scientific reports on ground water in this area on which the EA relies. It adds that the anticipated impacts are within the impacts already discussed in four previous regionwide EIS' on coal leasing. Finally, it notes that a decade of sustained groundwater use shows that impact by the Jacobs Ranch Mine has been far less than predicted.

10/ Coal leasing in the Powder River Basin was addressed from a broad perspective in the following EIS': in 1974, the Eastern Powder River Coal Basin of Wyoming Final EIS, including a site-specific analysis of the Jacobs Ranch mine; in 1979, a second regionwide EIS addressing the impacts of coal mining in the area at a slightly higher level than present operations; and in 1981, the Powder River Region Coal Final EIS addressing the impacts of coal development at nearly twice the level of present operations in preparation for a coal sale that never took place. Additionally, BLM also prepared in 1985 the Buffalo Resource Management Plan/EIS considering the regionwide impacts of BLM's land use planning on the environment, including an extensive discussion on coal development (BLM's Answer at 2-3).

The State notes that the EA specifically cited the following from a study entitled "Cumulative Potential Hydrologic Impacts of Surface Coal Mining in Eastern Power River Structure Basin, Northern Wyoming" (CHIA):

> Mining will not substantially change groundwater recharge rates and mechanism in the area. Post-mining recharge movement, and discharge of water in the overburdened and coal aquifers will not be substantially different from pre-mining conditions.
>
> Water level declines in the overburden due to coal mining are limited in extent and duration due to the generally discontinuous nature and limited hydraulic connection of the sandstone lenses that make up the primary sources of water within the overburden.
>
> Significant (5 feet or more) water level declines in and within one half mile of the proposed mine can be expected in the overburden. Water level declines in the coal aquifer could be significant from four to eight miles (worst case) from the mine pit the extent of the observed water level declines has been less (only approximately 3/4 mile at the Jacobs Ranch) then predicted by the models on environmental assessments prepared before the beginning of extensive mine development.
>
> Mining will initially degrade groundwater quality in the areas of mining. This will be expressed as an increase in total dissolved solids, including sulfate, nitrate, and possibly selenium and chromium. The quality should however, remain within the State standards for livestock use. The quality of water in the coal spoils should improve with time and approach pre-mining levels.

(State Reply at 15-16; EA at 23-24; CHIA at 160-61).

BLM and the State's responses refute appellants' contention that the EA fails to state the aquifer from which the wells draw or how the wells might be impacted. The EA specifically states that the wells at issue are in the shallow aquifers (coal and overburden Wasatch and the Wyodak coal aquifer). It discusses impacts to wells and aquifers, specifically addressing water level declines, water quality and recharge rates. In addition to the CHIA study mentioned by BLM and the State, the EA incorporates more recent data specific to the Jacobs Ranch mine:

> In addition to the data presented in the CHIA, each of the mines is required to monitor the impacts of their operations. The CHIA conclusions have been confirmed by ten years of monitoring at Jacobs Ranch Mine. An annual report of these monitoring data activities and data is prepared by the Gillette Area Groundwater Monitoring Organization (GAGMO). This report is reviewed by the BLM as well as several other regulatory agencies, including the
> Wyoming State Engineer's Office. Groundwater is temporarily disrupted in the active mine pit areas, but groundwater recharge

after reclamation has allowed water levels to recover to near pre-mining levels in about five years. Backfill well water quality has remained similar to premining conditions which is suitable for livestock use. As stated in the CHIA: "Postmining recharge, movement and discharge of groundwater in the Wasatch aquifer and Wyodak coal aquifer will probably not be substantially different from pre-mining conditions. Recharge rates and mechanisms will not change substantially. Hydraulic conductivity of the spoil aquifer will be approximately the same as in the Wasatch and the Wyodak coal aquifer allowing groundwater to move from recharge areas where clinker is present east of the mine areas through the spoil aquifer to the undisturbed Wasatch aquifer and Wyodak aquifer to the west."

(EA at 24-25).

Appellants assert that the EA offers no discussion of mitigation measures to be taken if individual wells are impacted, even though the potential impacts identified would be significant. BLM and the State have detailed Federal and State statutes and regulations requiring mine opera-tors to identify those wells that might be impacted by coal mining operations. Wyoming regulations require mine operators to conduct extensive monitoring, and a remedy (both in damages and in kind) is provided under state and Federal statutory law. That system, expressly referenced by BLM in its EA, constitutes adequate mitigation as no significant, immediate risk of damage to individual wells has been identified.

Although appellants indicate that ground water supplies from the Tullock deep aquifer in Gillette, Wyoming, have declined, nothing has been offered that connects that occurrence to surface mining in the Powder River Basin, approximately 52 miles away (see EA at 16). To the contrary, BLM's EA contains data substantially showing that the geology in the area is such that ground water is not continuous over that distance, so that it is not reasonable to attribute that decline with surface mining. Further, independent sources attribute declines in the Gillette area to withdrawals at trailer parks and subdivisions. Appellants have not established any connection between groundwater conditions in Gillette and surface mining in the Powder River Basin (see Answer of the State at 16-17).

Appellants also cite what they describe as a "problem at the [existing Jacobs Ranch] mine with selenium monitoring requirements." Appellants quote a mine inspection report prepared by the Office of Surface Mining Reclamation and Enforcement (OSM): "[O]verburden samples [and] surface and ground-water samples have indicated a pH of below 6. Potentially acidic material have [sic] been encountered in the overburden and specially handled in the backfill. Kerr-McGee resisted efforts to include selenium monitoring requirements" (SOR at 17, emphasis in original). As BLM points out in its answer, BLM's failure to consider that question in its EA was not unreasonable, as there has never been any evidence of selenium contamination at that mine. Selenium is in fact being monitored there, and the results of that monitoring are reported publicly every year (BLM Answer at 36).

Appellants cite BLM's failure to consider the potential for gas migration as a result of drawdown from the groundwater table, based on an incident in 1987 where residents near a mine in Gillette, Wyoming, were forced to evacuate their houses because of the release of methane and hydrogen sulfide gases.. Appellants express concerns regarding BLM's failure to consider mitigative measures in the EA. BLM responds effectively by pointing out that the geology in the area under study is different than that present where the incident occurred and that other factors unique to the area where the incident took place are implicated. The State adds that such concerns, and others not presently foreseen, can be addressed if found to be required during consideration of an application for a permit to mine the lands in question.

Appellants point out that BLM failed to cite fully in its EA portions of previous EIS' addressing environmental concerns. Appellant does not dispute that all documents tiered from or incorporated by reference were present at every public meeting. Nor can it be denied that BLM identified all documents that it intended to tier or incorporate by reference in the EA's Table of Contents, "Background Section," or identification of "references." In the instant case, BLM has adequately referred to supporting documents in the EA and has made those documents available as part of the public review process. We do not find the EA to be defective on this basis.

Appellants argue that BLM's EA improperly failed to consider alternatives. Consideration of alternatives in an EIS is called for by 42 U.S.C. § 4332(2)(C) (1988). Further, 42 U.S.C. § 4332(2)(E) (1988) has been construed as independently requiring consideration of alternatives in the EA's which form the basis for FONSI's. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); see 40 CFR 1508.9(b); 516 DM 3.4(a). This Board has previously expressly held that the requirement that appropriate alternatives be studied applies to preparation of EA's which serve as a basis for a FONSI, that all reasonable alternatives must be considered (North Slope Borough v. Andrus, 486 F. Supp. 326, 330 (D.D.C. 1979)), and that obvious alternatives may not be ignored (California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980)). Powder River Basin Resource Council, supra at 56; State of Wyoming Game & Fish Commission, 91 IBLA 364, 369 (1986). A necessary corollary of the rule that all reasonable alternatives be considered is that alternatives that are specula-tive (Seacoast Anti Pollution League v. Nuclear Regulatory Commission, 598 F.2d 1221, 1232 (1st Cir. 1979)) or not feasible need not be consid-ered. Westside Property Owners v. Schlesinger, 415 F. Supp. 1298, 1302 (D. Ariz. 1976), aff'd, 597 F.2d 1214 (9th Cir. 1979); Badoni v. Higginson, 455 F. Supp. 641, 649 (D. Utah 1977).

The record shows that BLM has not failed to include any obvious alternative. Appellants' assertion that BLM should have considered alternative tract configurations rings hollow, as alternative tract configurations have been shown not to be feasible. The record is clear why BLM limited consideration of alternative tract configurations: no minable coal exists to the

east, and BLM was precluded by the applicable RMP from currently including acreage to the west and north of the proposed tract. Appellants have not identified any legally permissible or feasible alternative that BLM failed to consider. The law is well settled that mere allegations of error are insufficient to justify reversing BLM's decision.

Appellants assert that BLM did not adequately consider the "no-action" alternative. We disagree. The no-action alternative was briefly considered in the EA, which addressed the situation were the application to be denied and the tract not offered at this time (EA at 11). See 40 CFR 1508.9(b). Further, as noted above, BLM has carefully and thoroughly reviewed the environmental effects of coal mining in the Powder River Basin over the course of many years and has already fully addressed the no-action alternative in previous EIS'. Its EA in the present case must not be read in vacuo, but in conjunction with that previous review.

We hold that appellants have failed to meet their burden of demonstrating that the FONSI was premised on a clear error of law, a demonstrable error of fact, or that BLM's analysis failed to consider a substantial environmental question of material significance to the action.

Arguments not expressly addressed herein have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for expedited consideration is granted, the motions to dismiss are granted in part and denied in part, and the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge